# Plausibility and the ICJ

## A response to Somos and Sparks

---

ajv2016 2018-10-12T09:42:28

Since the ICJ's 2001 decision in *LaGrand (Germany v US)*, the Court's jurisprudence on provisional measures indicated under Article 41 of its Statute has expanded dramatically. This is for two reasons—both, in my mind, connected to *LaGrand*. In the first place, with the Court having declared its provisional measures binding, it was incumbent upon it to ensure their requirements were clear and predictable. In the second (and in view of the first), the prospect of interim relief became a powerful tool in the arsenal of potential applicants—resulting in a relative deluge of applications and a corresponding increase in the opportunities available to the Court to refine its thinking on the matter.

Nowhere has that deluge been more apparent than in the past two years. During that time, the Court has issued five decisions on provisional measures: *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, *Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)*, *Jadhav Case (India v Pakistan)*,*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE)* and *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Iran v US)*.

(As a slightly churlish aside, all of these emerged in rapid succession immediately after I published a book on the topic. In hindsight, for me to speak of a "*comparative calm in the field*", as I did there, was wildly premature.)

Each of these decisions has continued the ICJ's development of its practice on provisional measures. But—as the 5 October 2018 post on *Völkerrechtsblog* by Mark Somos and Tom Sparks correctly notes—the greatest advances in the jurisprudence have been with respect to the so-called 'plausibility' test. This blog post has been prepared in response to their fine work.

In their post, Somos and Sparks identify what they consider to be a trend—exemplified in the *Qatar v UAE* and *Treaty of Amity* cases—of the Court relaxing the requirement of plausibility. This is said to be based on the Court's acceptance in both cases that the plausibility requirement would be met where the rights identified by the applicant were, in the first instance, grounded in "*a possible interpretation*" of the relevant treaty (see *Qatar v UAE* at paragraph 46; *Treaty of Amity* at paragraph 67).

I would like to posit a different view: the Court is actually *increasing*the requirements of plausibility. This is a trend that observers of the Court's practice—most notably Massimo Lando, whose work on the topic is first rate—had apprehended in the

Court's practice as early as the *Equatorial Guinea v France* or *Ukraine v Russia* cases. And this trend is perpetuated in the cases analysed by Somos and Sparks—particularly *Treaty of Amity*. So far as their criticism of the "*possible interpretation*" requirement in that case is concerned, however, I see this merely as making explicit what was previously implicit in the Court's jurisprudence. The real action is elsewhere.

**'Plausible' has always meant 'possible'**

In order to understand this point, we have to consider where the plausibility requirement comes from—and how the Court has generally gone about developing its jurisprudence on provisional measures. Somos and Sparks point to the Court's order in *Passage through the Great Belt (Finland v Denmark)* as the origin of plausibility, but I think that is somewhat ambitious. At paragraph 21 of that order, the Court repeats the Danish submission that Finland must demonstrate "*a reasonable prospect of success in the main case*". It then notes in paragraph 22 that the existence of the Finnish right was not challenged and implicitly adopts the Finnish argument that it would be inappropriate to pronounce on the merits at this stage. As is well-known, the Finnish application was eventually dismissed for lack of urgency. If there are hints of the plausibility test there, they are very faint indeed.

Rather, I see the plausibility test as being a post-*LaGrand* phenomenon originating in Judge Abraham's separate opinion in the first provisional measures order of *Pulp Mills on the River Uruguay (Argentina v Uruguay)*. There, Judge Abraham referred at paragraph 7 to *LaGrand*, and noted that in light of that case, the Court needed to undertake some review of the merits of the applicant's case to enhance its legitimacy—before finally settling at paragraph 11 on the formulation "*that there is a plausible case for the existence of the right*" claimed to exist by the applicant. (He also referred to *Great Belt*—not to the Court's order, but to the separate opinion of Judge Shahabuddeen—in paragraph 3.)

Judge Abraham's formulation was then adopted by the Court as a whole in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* at paragraph 57 of its order on provisional measures—where it has remained to frustrate scholars and practitioners ever since.

The ICJ built out from *Belgium v Senegal* in later cases. To my mind, at least, these have always reflected a mode of thought in which 'plausibility' is an extremely low bar. And that bar has always been framed (if not expressly by the Court) as referring to the mere 'possibility' that the claimed rights exist. Thus, in his separate opinion in the first provisional measures order in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Judge Greenwood noted at paragraph 4 that in order to satisfy the criterion of plausibility, the applicant must demonstrate "*something more than assertion but less than proof; in other words* […]*that there is at least a reasonable possibility that the right which it claims exists as a matter of law and will be judged to apply to that party's case*". He further linked this expressly with Judge Abraham's thoughts in *Pulp Mills*.

Judge Greenwood's equation of 'plausibility' with 'possibility' has now been formally adopted by the Court in paragraph 67 of *Treaty of Amity* case. This perpetuates what has always been the Court's practice in developing its jurisprudence on provisional measures, going back to Judge Lauterpacht being the first member of the Court to float a version of the *prima facie* jurisdiction test in *Interhandel (Switzerland v US)* at pages 117–119 of the 1957 *ICJ Reports*. That was then adopted by the Court proper in paragraph 17 of the first provisional measures order in *Fisheries Jurisdiction (UK v Iceland).* What is past is prologue, we may well say.

**Tightening the requirements for plausibility**

So, on that point, I respectfully disagree with Somos and Sparks. But what about my assertion that the Court is actually *tightening* the requirements for provisional measures?

I perceive this development from the Court's order in *Ukraine v Russia*—which is the first (and only) occasion (so far) that an applicant has failed to meet the plausibility threshold. At paragraphs 74–75 of the Court's order, it held that Ukraine's submissions that Russia had breached Articles 2 and 18 of the International Convention for the Suppression of the Financing of Terrorism were not plausible—not because the rights in question did not exist, but because (it seems) the Court was not satisfied that the alleged Russian actions had violated them on the merits. This implied that the Court was going further than it had previously on questions of plausibility—it was engaging in an assessment of the evidence.

The Court said:

> "*In the present case, the acts to which Ukraine refers* […] *have given rise to the death and injury of a large number of civilians. However, in order to determine that the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the other elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge noted above* […] *and the element of purpose specified in Article 2, paragraph 1 (b), are present. At this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present.*"

This represents a significant and welcome advance in the Court's thinking on provisional measures—a thought I develop at length in my recent article in the *British Yearbook of International Law*. Absent from the Court's reasoning, however, was an assessment of whether Ukraine's case on plausibility could additionally be defeated by the strength of Russia's defences on the merits—which would impose a further hurdle for the applicant to surmount.

That gap has now been filled in the *Treaty of Amity* case. At paragraph 68 of the Court's order, it was said:

> "*However, in assessing the plausibility of the rights asserted by Iran under the 1955 Treaty, the Court must also take into account the invocation by the United States of Article XX, paragraph 1, subparagraphs (b) and (d), of the Treaty. The Court need not carry out at this stage of the proceedings a full assessment of the respective rights of the Parties under the 1955 Treaty. However, the Court considers that, in so far as the measures complained of by Iran could relate 'to fissionable materials, the radio-active by-products thereof, or the sources thereof' or could be 'necessary to protect… essential security interests' of the United States, the application of Article XX, paragraph 1, subparagraphs (b) or (d), might affect at least some of the rights invoked by Iran under the Treaty of Amity.*"

On this basis, the Court seems to have found that Iran had only met the requirement of plausibility with respect to a limited number of the rights claimed. In the following paragraph, it said.

> "*Nonetheless, the Court is of the view that other rights asserted by Iran under the 1955 Treaty would not be so affected. In particular, Iran's rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, cannot plausibly be considered to give rise to the invocation of Article XX, paragraph 1, subparagraphs (b) or (d).*"

Paragraphs 68 and 69 represent a further tightening of the plausibility test—and one that could be overwhelmingly to the advantage of the respondent. As I read the order, the Court seems to be saying that if a defence raised by the respondent in the main proceedings "*might affect*" the rights asserted by the applicant, then this will render those rights non-plausible for the purpose of provisional measures. Thus, the respondent appears to benefit from the low threshold of plausibility originally introduced for the benefit of the applicant.

It is difficult to elaborate on this further in a blog post—and the relevant passage is Delphic rather than oracular. But if I *am*correct, then it would appear that a respondent could effectively undermine a request for provisional measures merely by positing a credible defence. That cannot be right. Surely, if plausibility is to be applied consistently, the defence raised by the respondent would have to be so strong that it renders the applicant's case on the merits non-plausible—that is, borderline impossible to succeed as presently pleaded. This would seem to subvert the *raison d'être* of provisional measures, being to protect the applicant's rights *pendente lite*. Further clarification is called for.

## Conclusion

So, I take a somewhat different view to Somos and Sparks as to the wider import of the Court's recent decisions on provisional measures—and on the order in the *Treaty of Amity* case in particular. But this difference of opinion does not necessarily mean that either of us is, for now, wrong (although someone will have to be eventually). Rather, it highlights a persistent difficulty with the Court's provisional measures jurisprudence—namely, that advances in that jurisprudence are difficult

to detect, can only be gleaned by close reading of the relevant orders and separate/ dissenting opinions, and lead to wildly different conclusions by informed observers.

Granted, a lot of this has to do with the Court's deliberative process. In controversial cases (as *Treaty of Amity* is), the Court's legitimacy is best protected by having as few separate and dissenting opinions as possible. In this respect, it bears pointing out that the order in *Treaty of Amity* was unanimous. With a bench of 16 judges (including *ad hoc*nominees—one of whom was replacing the permanent US judge, who has recused herself) this means that the desired compromise came at the expense of clarity—the perils of drafting by committee. But that lack of clarity tends to obscure the place of each case within the wider jurisprudence—upon the consistency and predictability of which the Court's legitimacy may ultimately be seen to rest. But this is nothing new in the world of international courts and tribunals. *Plus ça change*, indeed.

*Cameron Miles is a practicing public international lawyer and a barrister at 3 Verulam Buildings in London.*

Cite as: Cameron Miles, "Plausibility and the ICJ: A response to Somos and Sparks", *Völkerrechtsblog*, 12 October 2018.